but if it acts under the common law, the corporation has not yet left the state of incorporation.[18]

All the difficulty over these constitutional questions arises from theoretical views advanced by the Supreme Court; to say that a corporation cannot migrate, and to speak of excluding a foreign corporation from a state, leads to confusion of thought. It is submitted that the power of a state to create domestic corporations and limit their powers is of the same nature as the power to refuse to recognize the existence, or limit the powers of, foreign corporations; that is, the power of a sovereign over corporate action.[19] If this is so, since the state can admittedly exact any condition, even a so-called unconstitutional one, as a prerequisite to incorporation,[20] it may attach any condition to the legalizing of corporate action within its territory by a foreign corporation.[21] And, moreover, as soon as the state has legalized corporate action, the corporation on which it has thus acted is a person within the jurisdiction. Therefore the Kansas and Arkansas cases cannot be supported on any ground,[22] while the Alabama case is but a new extension of the Fourteenth Amendment.

CONTROL OF DIRECTORS OF A CORPORATION UNDER A PARTNERSHIP AGREEMENT BETWEEN STOCKHOLDERS. — Since a corporation can act only through individuals, directors are elected to manage the corporate affairs, in whom the powers of the corporation are usually vested by statute or charter.[1] Only a few corporate acts of a fundamental nature, such as an increase in the shares of stock or a change in the business of the corporation, require assent by the stockholders.[2] The directors become, however, the agents of the corporation and not of its individual members.[3] It is apparent, therefore, that any control by stockholders over corporate acts must be exercised indirectly, either by the election of the directors, or through the courts.[4] In matters of judgment or business policy the directors may act uncontrolled by the courts;[5] but where they are about to commit

[18] The latter point was decided in National Council *v.* State Council, *supra*, in which it was said of such corporations: "Those within the jurisdiction in such a sense, as they ever can be said to be within it, do not acquire a right not to be turned out except by general laws." And *cf.* St. Clair *v.* Cox, 106 U. S. 350.

[19] Substantially decided in the Alabama case, since the distinction between taxing a domestic corporation for being a corporation and taxing a foreign corporation for the privilege of doing business within the state was held an arbitrary classification.

[20] Ashley *v.* Ryan, 153 U. S. 436.

[21] If the Supreme Court had adopted this view, it would have allowed the state to exclude a corporation engaged in interstate commerce. The entire subject was thus one for Congress, not the courts. See 23 HARV. L. REV. 456, 463.

[22] But *cf.* 23 HARV. L. REV. 441, 450.

[1] Hopkins *v.* Roseclare Lead Co., 72 Ill. 373, 379; Rollins *v.* Clay, 33 Me. 132, 139; Hutchinson *v.* Green, 91 Mo. 367.

[2] Chicago Railway Co. *v.* Allerton, 18 Wall. 233; Stokes *v.* Continental Trust Co., 186 N. Y. 285.

[3] Smith *v.* Hurd, 12 Met. (Mass.) 371.

[4] Flynn *v.* Brooklyn City Railway Co., 158 N. Y. 493; Cann *v.* Eakins, 23 Nova Scotia, 475; Dana *v.* Bank, 5 Watts & S. (Pa.) 223, 247. Pullman Car Co. *v.* Missouri Pacific Railway Co., 115 U. S. 587, 596.

[5] Automatic Self Cleaning Co. *v.* Cunninghame, 22 T. L. R. 378; McCloskey *v.* Snowden, 212 Pa. 249.

a breach of trust, waste the corporate assets, do an act *ultra vires* the corporation, or act without the stockholders' assent in matters requiring it, equity will grant an injunction at the instance of a stockholder.[6] In the case of foreign corporations the prevailing doctrine seems to be that whenever the stockholder seeks in his derivative right, for the benefit of the corporation, to enjoin the directors, equity should refuse to intermeddle in the internal affairs of such corporation; and this although the threatened wrong be one which in the case of a domestic corporation would be enjoined.[7] The reason for the doctrine is that the corporation, which is a formal party to the suit, is not before the court, so that the merits of the case cannot be fully ascertained.[8] But where it is possible to get jurisdiction over the foreign corporation so that the merits can be determined, there would seem to be no valid objection to affording relief whenever necessary to do full justice. And the tendency is to grant the injunction when the directors are within the jurisdiction and when the subject-matter of the threatened wrong relates to property within the state.[9] When, however, the complaint relates merely to the business policy of the foreign corporation, the courts should refuse to take jurisdiction.[10] In a recent case it was held that where two men owned all the stock in a foreign corporation under an agreement that dummy directors should manage the business according to their joint directions, one of them could not restrain the directors from acting otherwise than according to the partnership agreement. *Jackson* v. *Hooper*, 42 N. Y. L. J. 2381 (N. J., Ct. Ch., Feb. 28, 1910).

Equity will sometimes disregard the corporate fiction in favor of third parties.[11] But where a stockholder has joined in making use of the corporate device, it is clear that he has no equity to establish a partnership.[12] As the court aptly remarks, stockholders "cannot be partners *inter se* and a corporation as to the rest of the world." The decision may also be said finally to have laid the ghost of the theory, urged unsuccessfully in a leading English case, that a corporation may be regarded as a mere agency of the stockholders if such be their purpose.[13] Their purpose is quite immaterial and the courts will look only to the effect of incorporation.[14] Since, therefore, there was no ground for disregarding the corporate fiction, the court was clearly right in refusing to allow the judgment of the directors to be controlled by a partnership agreement.

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[6] Dodge *v.* Woolsey, 18 How. 331; Sears *v.* Hotchkiss, 25 Conn. 171; Gregory *v.* Patchett, 33 Beav. 595; Chicago Railway Co. *v.* Allerton, *supra*. Where the stockholder's right is purely a derivative one, he must allege that the corporation has refused to sue. Flynn *v.* Brooklyn City Railway Co., *supra*.

[7] Condon *v.* Mutual Reserve Association, 89 Md. 99; McCloskey *v.* Snowden, *supra;* Ludlow *v.* Dutch Rhenish Railway Co., 21 Beav. 43. *Contra*, Pickering *v.* Stephenson, L. R. 14 Eq. 322.

[8] Stockley *v.* Thomas, 89 Md. 663. *Cf.* State *ex rel.* Watkins *v.* North American Land Co., 106 La. Ann. 621, 634.

[9] Richardson *v.* Clinton Wall Co., 181 Mass. 580; Harding *v.* American Glucose Co., 182 Ill. 551, 637. *Cf.* Hallenberg *v.* Greene, 66 N. Y. App. Div. 590, and Marshall's Valve Gear Co. *v.* Manning, 25 T. L. R. 69.

[10] MacDougal *v.* Gardiner, 45 L. J. Ch. 27; Hartley *v.* Welsch, 23 Pa. Co. Ct. 78.

[11] Beal *v.* Chase, 31 Mich. 490. See 23 HARV. L. REV. 216.

[12] Russell *v.* McLean, 14 Pick. (Mass.) 63; Einstein *v.* Rosenfeld, 38 N. J. Eq. 309.

[13] Salomon *v.* Salomon, L. R. [1897] App. Cas. 22.

[14] Pullman Car Co. *v.* Missouri Pacific Ry. Co., *supra*.